UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CYNTHIA A. GREENE, Plaintiff,	: :	
v.	:	Civil Action No. 3:00CV599(CFD)
CONNECTICUT BOARD OF ACCOUNTANCY, et al. Defendants.	: : :	

RULING AND ORDER

This action arose out of the delay by the Connecticut State Board of Accountancy ("the Board") in issuing the plaintiff's request for a certified public accountant's license and firm permit.[1] The plaintiff, who is proceeding pro se, claims that this delay, along with the failure of her former employer, Raymond A. LaFurge, to submit information to the Board on her behalf, constituted a restraint of trade under 15 U.S.C. §§ 1 and 4.[2] Pending is LaFurge's motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim [Doc. # 14].[3] He is the only defendant who has been served and appeared in this action.

For the following reasons, LaFurge's motion to dismiss is granted.

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[1]A public accountant's certificate is one of the prerequisites to obtaining a public accountant's license. See Conn. Gen. Stat. § 20-281e. Public accounting firms must also obtain a permit to practice before they begin to practice. See id. § 20-281.

[2]The plaintiff previously moved for a temporary restraining order, which was denied, and for a preliminary injunction. She withdraw the latter motion shortly after she received her license and firm permit on April 4, 2000. Her motion for a preliminary injunction was denied as moot on April 25, 2000.

[3]The plaintiff initially did not respond to this motion, but filed a response after the Court notified her that the motion to dismiss may be granted if she did not object. She also appeared at oral argument on the motion to dismiss.

Facts[4]

The Board meets monthly to review the applications of candidates for certified public accountant certificates, licenses, and firm permits. To receive a certificate, license and firm permit, candidates must meet an experience requirement, as well as several other criteria. See Conn. Gen. Stat. § 20-281c(e).[5] The plaintiff alleges that she was a candidate for certificate, license, and firm permit in March 2000. In anticipation of the Board's March 7, 2000 meeting, and to satisfy the experience requirement, the plaintiff telephoned LaFurge, her employer from November 1989 until May 1994, to request that he complete an employment verification form and mail it to the Board in time for its March meeting. She states that she spoke with LaFurge's office manager, informed her of her request, and explained that she would like LaFurge to fill out the form as quickly as possible. She sent the form to LaFurge a few weeks later; his office manager received it on February 9, 2000.

On March 6, 2000, the plaintiff spoke with a Board employee who told her that LaFurge's completed experience verification form had not been received. That night, the plaintiff's husband telephoned LaFurge and asked him to complete the form; LaFurge apparently refused to do so because it was "tax season" and he was extremely busy. The plaintiff explains that the next day,

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[4]In her complaint, the plaintiff relies upon an unsworn affidavit in which she sets forth the events leading up to the Board's March decision. Although the Court cannot consider the affidavit as evidence in this context, it will consider the plaintiff's statements as allegations. Accordingly, references to the plaintiff's complaint also refer to this affidavit. The allegations are assumed true for the purposes of considering the motion to dismiss.

[5]Conn. Gen. Stat. § 20-281c sets forth the requirements for obtaining a "certificate of certified public accountant," including an experience requirement. See § 20-281c(c)(e). Conn. Gen. Stat. § 20-281d sets forth the criteria for annual licenses for certified public accountants, and § 20-281e sets forth the requirements for annual firm permits.

the Board "tabled" the plaintiff's request for certification, license, and firm permit for two reasons: (1) it had not received the employment verification, and (2) it had not received her grade on the required ethics examination. The Board issued her certificate, license and firm permit one month later at its April, 2000 meeting.

The plaintiff argues that LaFurge's failure to complete and mail the employment verification form prevented her from opening an accounting business and from bidding on government and non-profit audits that were available in March and April. In addition, she alleges that LaFurge failed to submit the form to prevent her from competing with his firm for audits, particularly because her firm, owned by a woman, would apparently be entitled to certain advantages in the bidding process.[6]

In her complaint, the plaintiff made various allegations against both the Board and LaFurge based, apparently, on sex discrimination and various federal statutes. However, the plaintiff more recently filed a "Motion to Proceed Under U.S.C. Title 15 Sections 1 and 4" [Doc. # 24], which clarified her causes of action as based only on 15 U.S.C. §§ 1 and 4. Accordingly, the Court only will consider her allegations and arguments that relate to 15 U.S.C. §§ 1 and 4.

Standard

When considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all factual allegations in the complaint and draws inferences from those allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Dismissal is

[6]More specifically, the plaintiff explains that hers would be woman-owned business under 15 U.S.C. § 656(a)(2)(A). In an unsigned letter dated March 22, 2000 from the plaintiff and her husband to the State Board of Accountancy attached to her complaint, the plaintiff also claims that the Board's actions (and composition) "restrict free trade" by discriminating against her on the basis of her sex.

warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir.1998). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale New Haven Hosp., 727 F.Supp. 784, 786 (D.Conn.1990) (citing Scheuer, 416 U.S. at 232). In its review of a motion to dismiss, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir.1993). In reviewing this motion, the court is mindful that the Second Circuit "ordinarily require[s] the district courts to give substantial leeway to pro se litigants." Gomes v. Avco Corp., 964 F.2d 1330, 1335 (2d Cir.1992)

Discussion[7]

The defendant LaFurge argues that the plaintiff has not alleged any facts that could support a claim against him because she has not alleged any wrongdoing on his part that prevented her from receiving her accountant's license. In particular, the defendant notes that the plaintiff's failure to submit the proper information concerning the ethics exam was also a factor (in addition to LaFurge's failure to submit the employment verification), that contributed to the Board's decision to table her application. LaFurge also argues that 15 U.S.C. §§ 1 and 4 cannot

[7]LaFurge's motion to dismiss includes an argument that the action should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. However, LaFurge apparently did not receive page two of the plaintiff's complaint where she stated that she was pursuing this action under Titles 42 and 15 of the United States Code. After reviewing the original complaint at the hearing before this Court, LaFurge's attorney withdrew this basis for his motion to dismiss. The Court will not consider this argument further, as it appears that the plaintiff has properly invoked the federal question jurisdiction of this Court.

support a private cause of action such as here.

In response, the plaintiff argues that LaFurge's failure to return the employment verification form alone would have resulted in the Board's tabling of her request for certification and firm permit. She also contends this delay caused her to lose the ability to bid on approximately thirty government audits, and thereby restrained her trade under Title 15.

A. Applicable law

The Sherman Act, 15 U.S.C. § 1, provides in part,

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

Section 4 of the Sherman Act invests federal district courts with jurisdiction to prevent and restrain violations of antitrust laws, and it confers a duty on United States attorneys to "institute proceedings in equity to prevent and restrain such violations." 15 U.S.C. § 4. Private parties may not maintain a suit under Section 4. See U.S. v. Bendix Home Appliances, 10 F.R.D. 73, 76 (S.D.N.Y. 1949). However, private parties are able to seek redress for some antitrust violations, including violations of Section 1 of the Sherman Act, based upon certain provisions of the Clayton Act. See 15 U.S.C. § 15 (providing treble damages for private parties alleging violations of antitrust statutes); 15 U.S.C. § 26 (providing injunctive relief for private parties alleging violations of antitrust statutes). Because the plaintiff in this case is proceeding pro se, the Court will assume that she also invoked these provisions.[8]

[8]Here, the plaintiff seeks several forms of relief, including (1) reimbursement for lost bids, (2) the replacement of Board members, (3) the removal of two members of the Board, (4) an investigation into the ethical conduct of the Board's legal advisor, (5) the removal of the licenses

To state a claim under Section 1 of the Sherman Act, the plaintiff here must allege "a combination or some form of concerted action between at least two legally distinct economic entities" that "constituted an unreasonable restraint on trade either per se or under the rule of reason." Primetime 24 Joint Venture v. National Broadcasting Co., 219 F.3d 92, 103 (2d Cir. 2000) (citation omitted); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95-96 (2d Cir. 1998). A restraint on trade is unreasonable per se in only a limited number of circumstances where "a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination." Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)(quotation omitted).[9] Under the rule of reason, the plaintiff bears the burden of showing that the challenged action has an actual adverse effect on competition as a whole in the relevant market. See id.; Tops Markets, 142 F.3d at 96.

More specifically, the injury alleged by the plaintiff must be more than a personal injury. See Subsolutions, Inc. v. Doctor's Assocs., Inc., 62 F.Supp.2d 616, 620 (D. Conn. 1999). "'Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" Balaklaw v. Lovell, 14 F.3d 793, 796 (2d Cir. 1994) (quoting Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). This "antitrust injury

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and firm permits held by Board members and LaFurge, (6) and punitive damages of $10 million.

[9]Per se violations include horizontal and vertical price-fixing, division of market into territories, certain tying arrangements, and some group boycotts. See Capital Imaging, 996 F.2d at 542-43.

requirement underscores the fundamental tenet that '[t]he antitrust laws were enacted for the protection of competition, not competitors.'" Id. (quoting Brunswick Corp, 429 U.S. at 488) (internal quotation omitted)).

Even if a private party shows that she has suffered an antitrust injury, her right to recover damages under the Sherman Act may be limited based on several other factors. These include: "(1) the directness or indirectness of the asserted injury; (2) the existence of an indentifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of indentifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." Volvo North America Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988) (citing Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 540-45 (1983)) (quotations omitted). Some of these factors may also limit a plaintiff's right to injunctive relief. See id.

B. Restraint of trade in this case

Here, the plaintiff has not adequately alleged "a combination or some form of concerted action between at least two legally distinct economic entities." Primetime, 219 F.3d at 103. In her complaint, she alleges that because the Board's membership is dominated by white males, discriminatory practices occur whereby women and minorities are effectively prevented from obtaining certification and firm permits, as she was. Similarly, she alleges that LaFurge's failure to return her employment verification form barred her from receiving her certification and firm permit in a timely manner, and that it was motivated by his desire to prevent her from bidding on certain audits for which she might have an advantage as a woman. However, the plaintiff does

not allege that *LaFurge and the Board* acted in combination or in some sort of a concerted manner in restraining her trade. The only allegation that might suggest concerted action is made in the unsigned letter of March 22, 2000 from the plaintiff and her husband to David Guay (who apparently is an employee of the State Board of Accountancy). In that letter, which is attached to the complaint, the plaintiff and her husband state that "Ray LaFurge and the State Board of Accountancy seem to be doing everything they can to restrict free trade." While pro se complaints are held "to less stringent standards than formal pleadings drafted by lawyers," Boddie v. Schneider, 105 F.3d 857, 860 (2d Cir. 1997) (quotation omitted), this allegation, falls short of the clear allegation that is required to set forth concerted activity. See Subsolutions, 62 F. Supp. 2d at 627 ("[V]ague and conclusory allegations of concerted activity cannot withstand a motion to dismiss."); Rowe Entm't, Inc. v. William Morris Agency, Inc., 1999 WL 335138, No. 98 CIV. 8272(RPP), *6 (S.D.N.Y. May 26, 1999). Although the affidavit attached to her complaint also accuses the Board of "integrity problems," inadequate representation of women and minorities, and self interest in denying women certificates and licenses, neither it nor the complaint claim that Mr. LaFurge and the Board were acting together in a combination or concerted activity. As the Second Circuit has stated, "[u]nilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the antitrust law." Capital Imaging, 996 F.2d at 542. Therefore, the plaintiff has failed to state a claim under Section 1.

Further, while a plaintiff may state an antitrust claim based on race or sex discrimination that has anticompetitive effects, the plaintiff still must allege facts showing concerted action that

unreasonably restrained interstate commerce.[10] See Rowe Entm't, 1999 WL 335138 at *5. Even assuming that the plaintiff has alleged such concerted action, the defendants' conduct does not constitute an unreasonable restraint of trade under either of the applicable tests. First, delaying approval of an individual's license to practice a particular trade is not one of the per se restraints of trade. See id. at 542-43.[11] Second, the plaintiff does not allege any facts that indicate that LaFurge's actions had an actual adverse effect on competition as a whole in either the Connecticut accounting industry generally or on women accountants in this state. While she states that the predominance of "the white males who dominate the accounting industry" leads to

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[10]In addition to stating a claim for restraint of trade, the antitrust plaintiff must establish jurisdiction by satisfying the commerce requirement of the Sherman Act. This may be done in two ways: (1) "where the defendant's conduct directly interferes with the flow of goods in the stream of commerce (the 'in commerce' test); or (2) where the defendant's conduct has a substantial effect on interstate commerce (the 'effect on commerce' test)." Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 66-67 (2d Cir. 1997) (quoting McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242 (1980)). With respect to the second factor, "the inquiry is whether the aspects of the defendant's business that are infected by the allegedly unlawful conduct can reasonably be expected, as a matter of practical economics, to have a not insubstantial effect on interstate commerce." Id. at 67. Here, neither party mentions the commerce requirement. Even if the Board and LaFurge had acted together in some combination or concerted action (and the plaintiff fails to allege that they did), LaFurge's conduct–as alleged–affected only Greene, and thus it could not reasonably be expected to have had more than an insubstantial effect on interstate commerce. See Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. District, 31 F.3d 89, 95-96 (2d Cir. 1994) ("[M]ere bald assertions that defendants' activities restrain interstate commerce generally, along with reference to statutory language, are not substitutes for concrete allegations from which a not insubstantial effect on interstate commerce can be inferred."). Thus, this Court lacks jurisdiction to hear this action on that basis.

[11]Defendants' actions arguably might constitute a group boycott, which is a per se restraint on trade in some circumstances. See Bakalaw, 14 F.3d at 800. "Group boycotts . . . generally consist of agreements by two or more persons not to do business with other individuals." Id. However, it is not clear whether causing delay in obtaining a professional license can be considered an agreement not to do business with other individuals. Even if this were true, however, the plaintiff has not suffered an antitrust injury.

"discriminatory practices such as the one that occurred with me," she does not allege any facts to support this allegation. The only possible concerted actions alleged by the plaintiff are LaFurge's delay in completing the employment verification form and the Board's tabling of her application for a license and firm permit for one month. These actions could have injured only Greene, not any other individual. See Balaklaw v. Lovell, 14 F.3d at 796 ("The antitrust laws were enacted for the protection of competition, not competitors."). Thus, although the plaintiff suggests that the Board and LaFurge sought to prevent women from gaining access to the accounting industry, she does not plead with sufficient specificity actions showing that the defendants acted in a concerted manner to restrain the trade of women accountants in Connecticut. The Court recognizes that an antitrust claim is not subject to any heightened pleading requirement, and is mindful of the plaintiff's pro se status, but "[a] mere allegation that the defendants violated the antitrust laws as to a particular plaintiff . . . is insufficient to survive a Rule 12(b)(6) motion." Subsolutions, 62 F. Supp. 2d at 626-27 (citation omitted). Here, although the defendants' concerted actions may have prevented the plaintiff from participating in the audit bidding process, they did not result in injury to the market as a whole. See Capital Imaging, 996 F.2d at 543. Consequently, Greene has not alleged an "antitrust injury." Her injury can only be characterized as personal, and thus not sufficient under Section 1. See Subsolutions, 62 F. Supp. 2d at 620.

Finally, even assuming the plaintiff's alleged injury is anticompetitive in nature, it is also too speculative and indirect. See Volvo, 857 F.2d at 66. Although the plaintiff states that she lost the opportunity to bid on thirty audits, she does not allege how many of those audits she would have been awarded. Nor does she point to any method to show the number of audits she would have secured, or point to any reasonable basis in her complaint to set forth a direct injury.

Although "pleading of the evidence is surely not required . . . ," see Rowe Entm't, 1999 WL 335139 at *6 (quoting Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1976)), "a Section 1 conspiracy claim supported by vague and conclusory allegations of concerted activity cannot withstand a motion to dismiss." Subsolutions, 62 F. Supp. 2d at 627.

Conclusion

For the foregoing reasons, defendant LaFurge's motion to dismiss [Doc. # 14] is GRANTED. In addition, defendant's Request for Pretrial Hearing [Doc. # 19] is GRANTED, nunc pro tunc, and plaintiff's Motion to Proceed Under U.S.C. Title 15 Sections 1 and 4 [Doc. # 24] is GRANTED. Plaintiff's Motion to Sanction Defense Counsel Under F.R.C.P. 11(c) [Doc. # 25] is DENIED. Given that there is no return of service on the other named defendants, they are dismissed from the case under Fed. R. Civ. P. 4, and the Clerk is directed to close this case. This ruling is without prejudice to the plaintiff moving to reopen the case against the other defendants within 14 days of the date of this order if she is able to show that they were properly served.

SO ORDERED this 20th day of March, 2001, at Hartford, Connecticut.

/s/
Christopher F. Droney
United States District Judge